IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1175

PAULA BETH LASHLEY MAHER, Administratrix of
the Succession of Morris G. Maher,
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, ET AL.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MAY IT PLEASE THE COURT:

Mrs. Paula Maher petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit upholding the constitutionality of the ordinances of the City of New Orleans regulating the architectural features of the exterior of the buildings located in the Vieux Carre. These ordinances, which have now been in effect for forty (40) years, regulate that area of the City of New Orleans nationally referred to as the French Quarter.

STATEMENT OF THE CASE

Mr. Maher's statement of the case is substantially correct, however, the factual background of this litigation is much more intricate than set forth in his Petition For Writ of Certiorari.

The facts are more fully set forth in Judge Heebe's (Petition For Writ, A-37 thru A-41) opinion and are as follows:

> Mr. Maher, until his recent death, resided at 810 Dumaine. The property at 818-820 Dumaine, a Victorian cottage next door to the residence, is the subject of over ten years of arduous and determined legal struggle.
>
> In March of 1963, Mr. Maher applied to the Vieux Carre Commission for authority to demolish the cottage and replace it with an addition to his home. The addition would have included seven rent-producing apartments.

Although the Architectural Committee of the Commission had approved the construction plans, the Vieux Carre Commission disapproved the application to demolish on April 16, 1963. A number of property owners, the Vieux Carre Property Owners and Associates, Inc., the French Quarter Residents Association and the Lousiana Council for the Vieux Carre had strenuously opposed demolition.

On June 18, 1963, after considering a letter from Mr. Maher's architect, the Commission voted to obtain a report from the Vieux Carre Survey Advisory Committee. The committee was in the process of making an architectural analysis for the entire French Quarter through the use of a survey conducted by the Schleider Foundation in connection with Tulane University. That report classified the cottage as "worthy of preservation as part of the scene."

On September 17, 1963, the Vieux Carre Commission again disapproved of the application to demolish.

On October 31, 1963, Mr. Maher again applied to the Commission. On December 17, 1963, the Commission, meeting in a closed session, overruled its two previous decisions and granted the application to demolish.

On February 13, 1964, a group of property owners, acting under the name of the Vieux Carre Property Owners and Associates, Inc., appealed the decision of the Vieux Carre Commission to the City Council. The Council, after a hearing, resolved that the cottage had architectural or historical value, overruled the decision of the Commission and ordered the Director of the Department of Safety and Permits of the City of New Orleans not to issue a demolition permit to Mr. Maher.

On July 23, 1964, Mr. Maher filed suit in Civil District Court for Orleans Parish asking that the decision of the City Council be held null and void. At this time, it was agreed by all parties to the suit that the action of the Council was indeed void since the Council had considered the matter before Mr. Maher had requested a permit from the City Department of Safety and Permits to demolish the cottage. Mr. Maher applied to the Department for his permit but was refused. He then appealed to the City Council for a reversal of the action of the Department.

On August 16, 1966, after a hearing, the Council reaffirmed its previous ruling and overruled the Vieux Carre Commission's grant of the demolition permit.

The suit in Civil District Court was resumed, and on December 7, 1967, was tried. On February 26, 1968, Judge Garvey, without written reasons, rendered judgment "as prayed" in

favor of the plaintiff.

On appeal, the Louisiana Court of Appeal for the Fourth Circuit reversed the trial court and dismissed the suit. The Court, in an opinion reported at 222 So. 2d 608 (La. App. 1969), held that the action of the City Council was proper and that the Vieux Carre Ordinance was constitutional both on its face and as applied in Mr. Maher's case.

Mr. Maher applied to the Louisiana Supreme Court for writs of review. These were granted, and the Court affirmed the judgment of the Court of Appeal denying the demolition permit. In its opinion, the Court held that the actions of the City Council were proper under Louisiana law but declined to consider any attack on the constitutionality of the ordinance since "no plea attacking its constitutionality for any reason was filed in the district court. * * * Consequently (constitutional issues) cannot be considered by us now." Maher v. City of New Orleans, 256 La. 131, 235 So. 2d 402, 405 (1970). In a foot note, the Court observed that:

> "Apparently without realizing that the constitutional issue had not pleaded (sic) in the trial court the Court of Appeal did pass on the constitutional question set out in assignment of error "B" and held that our decision (sic) in City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 and City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 in which we maintained the validity of the ordinance had set at rest the question of whether or not the ordinance was subject to attack because it was too vague and indefinite. We are inclined to agree." 235 So. 2d at 405, fn. 3.

In passing, the Court noted that it was completely satisfied that "the Maher cottage composed part of the elusive 'tout ensemble' of the Vieux Carre as described by this Court . . .

and that it does have architectural value."

On January 14, 1971, Mr. Maher filed suit in this Court seeking a declaration of the unconstitutionality of the Vieux Carre ordinance and an injunction against its enforcement. He, and now his estate, have challenged the constitutionality of the ordinance, both on its face and as applied.

Judge Heebe, in denying Maher's petition, found that the Vieux Carre Ordinances (which are cited at length in the Petition For Writ of Certiorari on A-60 thru A-75) met all of the Constitutional tests.

Judge Heebe's decision was upheld in the United States Court of Appeals, Fifth Circuit. Judge Adams, writing for the Court, concluded:

> The Vieux Carre Ordinance was enacted to pursue the legitimate state goal of preserving the "tout ensemble" of the historic French Quarter. The provisions of the Ordinance appear to constitute permissible means adapted to secure that end. Furthermore, the operations of the Vieux Carre Commission satisfy due process standards in that they provide reasonable legislative and practical guidance to, and control over, administrative decision making.

Once the district court concluded it was at liberty, under principles of finality, to reach the merits of Maher's case, that court was not persuaded that the denial of a demolition permit was arbitrary. It did not find that the ordinance as applied to Maher constituted a taking of Maher's property for which compensation was indicated. These determinations, based on the proof proffered there, are not clearly erroneous.

An order will, therefore, be entered affirming the judgment of the district court.

The questions presented for review are the same as those that were rejected by the District and Appellate Court, i.e. (Point I) is the Ordinance as applied to Maher, a permissible exercise of the Police Power; and (Point II) does the Ordinance contain sufficient guidelines to comply with the due process clause of the United States Constitution?

REASONS FOR DENYING THE WRIT

POINT I

Maher argues that the Court of Appeals held:

> ". . . that once the City ordered Maher to preserve his building, Maher must prove:
>
> ". . . that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return or that other potential use of the property was foreclosed . . . "
> (Page 29A, infra)

The final sentence to the paragraph quoted above is:

> "to the extent that such is the *theory underlying Maher's claim*, it fails for lack of proof."

The Court of Appeals did not hold that these *were* the *only* guidelines in determining whether or not a taking had taken place. It merely held that Maher failed to submit adequate proof to satisfy his *own theory* of what constitutes a taking.

Immediately preceeding the language quoted by Maher (A-29 Petition For Writ) the Court holds:

> "As the ordinance was applied to Maher, the denial of the permit to demolish and rebuild does not operate as a classic example of eminent domain, namely, a taking of Maher's property for government use. Nor did Maher demonstrate to the satisfaction of the district court that a taking occurred because the ordinance so diminished the property value as to leave Maher, in effect, nothing."

This, we suggest, is the true test of what constitutes a taking. Did the application of the ordinance, insofar as the Maher cottage is concerned so diminish the value of the property as to leave Maher, in effect, nothing? This question must be answered negatively.

The City of New Orleans is not physically taking the Maher cottage. Mr. Maher's estate still owns it and can use it for the same purpose that it was originally constructed for. It can be utilized as a single family dwelling or developed into an apartment complex. The public cannot use it in anyway save the exception of viewing the street facade.

Most importantly is the added fact that Maher is not asked or required to do anything more or less than his neighbors that occupy the one hundred (100) square blocks that comprise the Vieux Carre.

Maher has cited and relied to considerable extent on the decision of Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922), *United States v. Dickinson*, 331 U.S. 745, 67 Sup. Ct. 1382, 91 L. Ed. 1789 (1947), *Martin v. District of Columbia*, 205 U.S. 135, 27 S. Ct. 441 (1907) and *Block v. Hirsh*, 256 U.S. 135, 41 S. Ct. 458 (1921). These are truly broken reeds on which to lean and involve facts far afield from those in the case at bar.

Mahon was a suit arising out of a threat to a house due to

subsidence caused by mining. Maher has quoted briefly from this case in his brief, however, we have no fear whatever in quoting the real and actual basis upon which the decision turned:

> "Government hardly could go on if to some extent values incident to property could not be diminished *without paying* for every such change in the general law. *As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.* But obviously this implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."
> (Emphasis supplied).

The *Mahon* case has been the subject of several law review articles, particularly one in 74 *Yale Law Journal* 36 where the author quotes from Holmes and says that:

> Where the exercise of the police power makes the affected property "wholly useless, the right of property would prevail over the other public interest and the police power would fail". The author then cites other cases by Holmes to the effect that the police power would prevail where the "taking" was "comparatively insignificant" or the loss was relatively small.

From 44 *So. Cal. Law Review* 37, we excerpt this pithy summation on Mahon:

> "Holmes, however, recognized that even a very substantial private property loss could be justified by overriding public interest. See e.g. Erie R.R. v. Public Utilities

Comm'rs. 254 U.S. 394, 400 (1921)".

United States v. Dickinson, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947) involved the obtaining of easements by the government, without condemnation proceedings, in connection with damming a river. The water rose and flooded Dickinson's land. The Court very properly held that the landowner was entitled to compensation for the full value as of the time of flooding.

Martin v. District of Columbia, 205 U.S. 135, 27 S. Ct. 441 (1907) related to apportioning the cost of widening an alley. The Court held that the cost must be allocated according to the benefit to each lot.

Block v. Hirsh, 256 U.S. 135, 41 S. Ct. 458 (1921) was a suit for possession of a cellar which was resisted as the tenant claimed the right to hold over under a World War I law. The Court upheld the constitutionality of this temporary wartime measure, though it was a close question and four judges dissented.

We might summarize the above cases by saying that none of them involved zoning or regulatory laws such as the Vieux Carre Ordinance; and we have no quarrel with the holdings of the Courts in all of these cases.

In his original brief, Maher relied heavily on *Trustees of Sailors Snug Harbor v. Platt*, 280 N.Y.S. 2d 75 and 288 N.Y.S. 2d 314; and *Keystone Associates v. Mordler*, 278 N.Y.S. 2d 185, 243, both of which are cases involving the New York Landmarks Code.

Sailors Snug Harbor is conspicuously absent from the brief in support of the application for writs and Keystone Associates has been relegated to a mere footnote. The reason for this is

the recent New York Appellate Court decision (December 16, 1975) in *Penn Central Transportation Company v. The Landmarks Preservation Commission of the City of New York*, 377 N.Y.S. 2d 20. In this decision New York turned the corner and joined the rest of the nation in the field of preservation.

Justice Murphy, speaking for the Court stated:

> In recent years, as we have become painfully aware that "the frontier" has been disappearing and our natural resources are rapidly being depicted, there has been an increasing national growth of interest in preserving irreplaceable buildings and sites which have historical, aesthetic or cultural significance.

In commenting on the "taking issue," the Court concluded:

> The sole question to be decided, then, is whether plaintiffs have satisfactorily established that the law, as applied to them in this case, imposes such a burden as to constitute a compensable taking. Put another way, while the exercise of the police power to regulate the private use of property is not unlimited, it is for the one attacking such regulation in any given case to establish that the line separating valid regulation from confiscation has been breached.

Since 1941, the Louisiana appellate courts have upheld the constitutionality of the Vieux Carre Ordinance without exception. *City of New Orleans v. Impastato*, 3 So. 2d 559; *City of New Orleans v. Levy*, 64 So. 2d 798; *City of New Orleans v. Pergament*, 5 So. 2d 129; *Vieux Carre Propery Owners and Associates v. City of New Orleans*, 167 So. 2d 367; *Maher v. City of New Orleans*, 222 So. 2d 608 and 235 So. 2d 402. In *City of New Orleans v. Pergament*, supra, from which the trial judge quoted in his opinion, the Louisiana Supreme Court used the following emphatic language on this subject:

> "The ordinance might be deemed violative of the equal protection clause in the Fourteenth Amendment if the ordinance undertook to confer upon the Vieux Carre Commission the authority to grant or withhold permits arbitrarily, *or without prescribing uniform requirements or standards* which all persons similarly situated should be obliged to comply with. *But the ordinance does prescribe such uniform requirements or standards.* And there is nothing arbitrary or discriminating in forbidding the proprietor of a modern building, as well as the proprietor of one of the ancient landmarks, in the Vieux Carre to display an unusually large sign upon his premises. The purpose of the ordinance is *not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble,* so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance. The preservation of the Vieux Carre as it was originally is a benefit to the inhabitants of New Orleans generally, not only for the sentimental value of this show place but for its commercial value as well, because it attracts tourists and conventions to the city, and is in fact a justification for the slogan, America's most interesting city." (Emphasis supplied)

Accordingly, it is submitted that the Fifth Circuit Court of Appeals correctly concluded that the Vieux Carre Ordinance was enacted to pursue the legitimate State goal of preserving the "tout ensemble" of the historic French Quarter and that the provisions thereof constitutes permissible means adapted to secure that end.

POINT II

Not all governmental regulation of a citizen's affairs is entitled to constitutional scrutiny. It serves us well to observe that the third inalienable right enunciated by our founding fathers was "the pursuit of happiness," not "property" or "private property", as well it could have been. The Bill of Rights proscribes safeguards respecting "life" and "liberty", but its only enshrinement of private property is found in the prohibitions against deprivation without due process and taking for public use, without just compensation, as found in the Fifth Amendment. Quite simply, our founding fathers never intended nor did they provide for the right to unlimited "use" of private property when that use runs contrary to reasonable regulations arising from established public policy. *Berman v. Parker*, 348 U.S. 26 (1954).

If this court resolves the "taking" and "deprivation" issue in favor of the respondents, as briefed hereinabove, then the only remaining right on which the petitioner relies is "use;" and that right has never received the "void for vagueness" scrutiny accorded the provisions of the Bill of Rights. *Palko v. Connecticut*, 302 U.S. 319 (1937). In refusing a challenge by a property owner to the constitutionality of a Long Island zoning ordinance that limited rental of an apartment to a family, necessarily excluding unrelated college students, this Court recently held that no "fundamental" constitutional right was involved. *Village of Bell Terre v. Boraas*, 416 U.S. 1, at page 7 (1974).

Professor Anthony G. Amsterdam's well recognized treatise on vagueness concludes in part as follows:

> "Vagueness analysis represents methodology on several levels. Functionally it is a means for securing the Court's Control over the methods by which governmental compulsion may be brought to bear on the individual. In this

> aspect, it involves an appraisal of the states' methodology from the perspective of probable regularity of operation in the light, in any given case, both of the subject matter's inherent amenability to regulation by articulate uniform rule, and of the seriousness of what is at stake if regulation if left non-uniform and happens to work erratically."
>
> *The Void-for-Vagueness Doctrine in the Supreme Court* 109 V. Pa. L. Rev. 1 (1960).

If the unlimited use of private property is not a fundamental constitutional right, it follows that the requirement of seriousness of the matter at stake is not present. Moreover, the petitioner accepts the goal of historic preservation generally as a worthy cause, but challenges the method by which preservation limitations are imposed on her. That calls to question the inherent amenability of this laudable purpose to the guidelines that plaintiff demands. The overwhelming majority of other jurisdictions that have adopted historic preservation laws, have done so without any of the guidelines that are demanded by the petitioner here. If petitioner demands guidelines, then it should be her burden to prove that this matter is susceptible of guidelines and to offer some such guidelines, at least by way of example. This burden has never been carried by the petitioner. The ordinance is entitled to the presumption of constitutionality, and that presumption has never been rebutted.

Assuming arguendo that the void-for-vagueness doctrine is applicable, we respectfully submit that adequate guidelines do exist. We quote from the Court of Appeals, as follows:

> "While concerns of aesthetic or historical preservation do not admit to precise quantification, certain firm steps have been undertaken here to assure that the Commission would not be adrift to act without standards in an impermissible fashion. First, the Louisiana Constitution, the

Vieux Carre Ordinance and, by interpretation, the Supreme Court of Louisiana, have specified their expectations for the Vieux Carre, and the values to be implemented by the legislation."

"Further, the legislature exercies substantial control over the Commission's decision making in several ways. Where possible, the ordinance is precise, as for example in delineating the district, defining what alterations in which locations require approval, and particularly regulating items of special interest such as floodlights, overhanging balconies or signs.

Another method by which the lawmaking body curbed the possibility for abuse by the Commission was by specifying the composition of that body and its manner of selection. Thus, the City is assured that the Commission includes architects, historians and business persons offering complementary skills, experience and interests.

The elaborate decision making and appeal process set forth in the ordinance creates another structural check on any potential for arbitrariness that might exist. Decisions of the Commission may be reviewed ultimately by the City Council itself. Indeed, that is the precedure that was followed in the present case."

Maher v. The City of New Orleans, et al
516 F. 2d 1051, 1062 (1975)

We contend that this ordinance, taken as a whole, provides fair warning or notice to a property owner who comes within its reach. See *Smith v. Goguen*, 415 U.S. 566 (1974). The Commission's authority is limited to the modification, construction and demolition of buildings within a limited area. Both the authority and the operative principle by which it is applied are

more clearly defined and limited than the redevelopment authority that was sustained by this Court in *Berman v. Parker*, supra. The penal provisions of the ordinance in question do not begin to operate until a specific defect as enumerated in the ordinance has been called to the property owner's attention.

Of the four cases cited by petitioner for the proposition that "void for vagueness" has application in civil matters, three are patently and obviously criminal and immigration cases. The only case cited by petitioner that actually applies void for vagueness to civil matters is *Small v. American Sugar Refining Company*, 267 U.S. 233 (1925). In that case, plaintiff sought to enforce a contract and defendant pleaded in defense a criminal statute that had been declared invalid as vague. The Court said that if it was invalid for criminal conduct it was not available as a defense in a civil action. But in so doing, the Court enunciated a vagueness test for civil matters: "so vague and indefinite as to be no rule at all." Ibid at 239.

In conclusion, we submit that the void-for-vagueness analysis is inapplicable to petitioner's claim; and in the alternative, that the ordinance provides sufficient standards to pass constitutional muster.

CONCLUSION

The American people are now cognizant of the significance of such things as their environment, the ecology and their historic heritage. The worthy objectives of historic preservation cannot be obtained without some modicum of sacrifice and dedication on the part of all the people.

As set forth in Pergament (supra), "the purpose of the Vieux Carre Ordinance is not only to preserve the old buildings themselves, but to preserve the whole French and Spanish Quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism." This is a legitimate state goal and, as applied to Maher, it does not constitute a taking within the meaning and intention of the Fifth Amendment of the United States Constitution.

The Vieux Carre Ordinance, taken as a whole, provides fair warning or notice to property owners who come within its reach. The Ordinance further provides adequate legislative direction to the Commission to enable it to perform its functions within the due process clause.

We ask that the writ be denied.

Respectfully submitted,

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CERTIFICATE

It is certified in accordance with Supreme Court Rules 21 and 33, that three copies of the foregoing petition for certiorari have been served on each of the individuals named below, by depositing same in a United States mail box, first class postage prepaid, or, if applicable, air mail postage prepaid, addressed as follows:

Harold B. Carter, Jr. and Walter M. Barnett
Montgomery, Barnett, Brown and Read
806 First National Bank of Commerce Building
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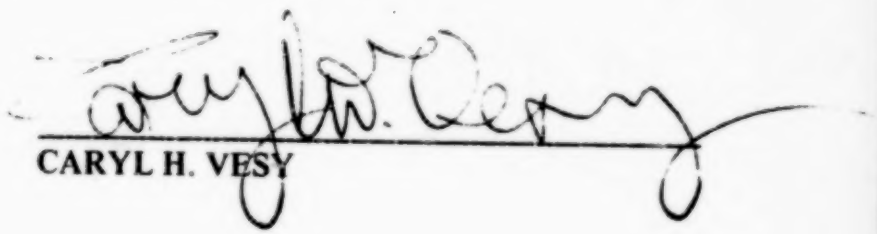
New Orleans, Louisiana, May 12, 1976



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